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IN THE

Supreme Court of the United States

ST. JOHN'S UNITED CHURCH OF CHRIST, HELEN RUNGE, and SHIRLEY STEELE,

Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION, and LYNNE A. OSMUS, Acting Administrator, and CITY OF CHICAGO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Petitioners, whose sacred religious cemetery will be desecrated and destroyed by the proposed expansion of O'Hare Airport – a project to be funded by billions of dollars authorized by the FAA – have Article III standing to enforce compliance by FAA with the protections afforded by the Religious Freedom Protection Act, 42 U.S.C. §2000bb, *et seq.*

PARTIES TO THE PROCEEDINGS

Petitioners are St. John's United Church of Christ, Helen Runge, and Shirley Steele. They were petitioners in the United States Court of Appeals for the District of Columbia Circuit.

Respondents are the Federal Aviation Administration, and Lynne A. Osmus, Acting Administrator; and the City of Chicago (Intervenor for Respondent).

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Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

St. John's United Church of Christ ("St. John's") and two of its members, Helen Runge and Shirley Steele (collectively "Petitioners"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINION BELOW

The opinion of the District of Columbia Circuit dismissing Petitioners' claim that the Federal Aviation Administration ("FAA") violated the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §2000bb-1, is reported at 550 F.3d 1168 and reprinted in the appendix hereto ("App.") at 1a.

JURISDICTION

The judgment of the Court of Appeals was entered on December 19, 2008. App. 1a. A timely petition for rehearing and rehearing *en banc* was denied on February 19, 2009. App. 13a-14a. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

INTRODUCTION

The City of Chicago asserts that it will build a 14.3 billion dollar project to expand O'Hare Airport, which is depicted in the "Airport Layout Plan" submitted by Chicago and approved by FAA in 2005. App. 19a, 21a; JA-09048.

The expansion project proposes to destroy St. Johannes Cemetery, an historic religious cemetery owned by Petitioner St. John's. A central tenet in the religious beliefs and practices of St. John's and its congregation is the belief that the graves in the consecrated ground of St. Johannes must not be disturbed until Jesus Christ raises the dead on the Day of Resurrection. Destruction of St. Johannes and removal of the graves will violate the religious beliefs and practices of St. John's and its congregation. App. 2a.

Under Chicago's proposal, FAA is scheduled to provide for the O'Hare airport expansion several billion dollars in federally authorized financial assistance, in grants pursuant to 49 U.S.C. §47101 *et seq.,* and in federally authorized passenger facility charges ("PFCs") pursuant to 40 U.S.C. §40117.[1]

The Religious Freedom Restoration Act. 42 U.S.C. §2000bb, *et seq.,* prohibits the federal government from imposing a substantial burden on the exercise of religion unless the federal government proves: (a) that the harm to religion is in furtherance of a compelling governmental interest; and (b) the alternative that harms religion is the least restrictive means of furthering that compelling governmental interest.

Chicago has already requested and received in excess of $1.3 billion in federal grants and federal PFC authorizations for the airport expansion project. JA-09185. The decision below stems from Petitioners' RFRA challenge to an FAA decision to authorize $1.282 billion in PFCs specifically

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[1] According to Chicago's 2004 estimate, the cost for the expansion project is $14.29 billion. Of that amount Chicago states that $891,690,000 will come from federal grants and $3.123 billion will come from federally approved PFCs. According to Chicago, the remainder will supposedly come from $8.8 billion dollars in airline authorized bonds and $1.4 billion in private investment. At the time this Petition has been filed the airlines have refused to agree to any further airline backed bonds beyond $1.8 billion in such bonds previously authorized for the initial phase of the expansion. JA-09048; JA-09119; Addendum to Petition for Rehearing, at A-15 to A-23.

designated for elements of the project that include destruction of St. Johannes Cemetery.

The Court of Appeals never reached the substantive underlying question as to FAA's RFRA compliance because it concluded that Petitioners lacked standing. Standing requires: (1) an "injury in fact"; (2) a causal connection between the injury and the conduct complained of; and (3) it must be "likely," as opposed to merely "speculative," that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

The decision below rested solely on the third element of standing, in a purported failure of "redressability." App. 4a. The Court of Appeals ruled that there was no "redressability" because it accepted Chicago's claim that if the PFC approval were denied by FAA Chicago could obtain the $1.282 billion elsewhere (and presumably the additional billions in federal grant and PFC funds required for the overall project as well). Therefore, the Court of Appeals assumed that Chicago would destroy St. Johannes Cemetery even if no federal funds were available.

The Court of Appeals held that there was no redressability despite the likelihood that Chicago would comply with an FAA directive to preserve St. Johannes, just as Chicago had complied with an FAA directive to save a similar religious cemetery (Rest Haven Cemetery) also in the path of O'Hare expansion.

Certiorari is warranted in this case for several reasons.

Certiorari is warranted because the Court of Appeals' finding of no redressability (and therefore no Article III standing) conflicts with the this Court's decisions in *Utah v. Evans*, 536 U.S. 452, 463-64, (2002), and *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992). Consistent with *Utah v. Evans* and *Franklin v. Massachusetts*, given the strong likelihood that Chicago would comply with any decision by FAA (or by the Court of Appeals) that the Petitioners were entitled to substantive protection under RFRA, the Court of Appeals should have recognized presumptive redressability for purposes of standing.

Certiorari is also warranted because the issue of standing redressability, as applied by the Court of Appeals, has devastating implications for RFRA protection in federal funding programs for actions by non-federal actors that are destructive of religious practice, in a host of other activities ranging, *e.g.*, from highways to sewage treatment plants.

The decision below arises in the immediate context of a prior related decision by D.C. Circuit that an FAA permit-type approval of Chicago's proposed "Airport Layout Plan" ("ALP") for the same expansion project did not trigger a RFRA obligation because (according to the Court of Appeals) the FAA approval did not constitute sufficient "encouragement" or "coercion" to implicate FAA in Chicago's decision to destroy St. Johannes. *Village of Bensenville, et al. v. FAA*, 457 F.3d 52 (D.C. Cir. 2006). App. 31a.

The *Village of Bensenville v. FAA* ruling effectively means that federally required

permitting for actions by non-federal actors that injure religion will not trigger RFRA religious protection obligations in the federal permitting agency under any circumstances. As discussed *infra*, this unfavorable treatment of religious protection is in sharp contrast to the law applied to federal permitting approval for environmentally destructive actions by non-federal actors, which triggers both federal agency responsibility and Article III standing in the courts to enforce environmental statutes.

Village of Bensenville v. FAA left undecided whether billions of dollars in federally authorized *funding* of a project executed by non-federal actors that imposes a substantial burden on the exercise of religion was sufficient federal "encouragement" or involvement to implicate RFRA.

Now the Court of Appeals decision below has created a an even larger evasion of Congress's RFRA directive to protect the exercise of religion. Under a pretext of a lack of "redressability," the Court of Appeals below has effectively eviscerated RFRA as a substantive protection against religious harm caused by federally funded projects – even where the federal government provides more than $1 billion in federally authorized funds for the project that harms religious exercise, and where billions more in federally authorized funding is projected.

Taken together, the Court of Appeals' decisions in *Village of Bensenville v. FAA* and in the decision below virtually assure that there will be no RFRA protection for any federally permitted or federally funded project undertaken by a non-federal third

party, regardless of the burden it places on religious exercise.

In enacting RFRA, Congress mandated that the federal judiciary apply strict scrutiny against federal action that substantially burdens religious exercise.

But in using the jurisdictional device of redressability as a rationale for refusing to enforce RFRA's substantive protections against FAA's $1.282 billion funding authorization (on the theory that the third party recipient can get the $1.282 billion elsewhere), the Court of Appeals has eviscerated substantive religious protection under RFRA. By refusing to enforce RFRA's substantive protections against FAA's $1.282 billion funding authorization, the Court of Appeals also has ignored its own Article III responsibility to exercise the jurisdiction mandated by Congress.

The stark irony here is that the Court of Appeals ruling uses standing to deny enforcement of religious protection under RFRA, while federal funding programs for airports, highways and a host of other projects by non-federal actors are subject to protection and judicial enforcement of various federal environmental laws. Is congressionally mandated protection of religious rights entitled to less judicial enforcement than environmental laws?

Finally, if judicial enforcement of environmental laws are to be on equal footing with judicial protection of religious laws, certiorari is warranted because of the potential application the ruling below to violations of federal environmental laws. The Court of Appeals' ruling establishes a dangerous new precedent for an ultimate dramatic

weakening other statutory protections, such as in environmental statutes, in cases involving federal funding for an array of third party projects (such as highways, rail, sewage treatment plants and other federally funded state and local projects).

Local governments wishing to build federally funded projects that will destroy precious parks, wetlands and historic sites will be able to avoid judicial enforcement of federal environmental laws altogether by merely claiming that they have alternative sources of funds, as Chicago has done here to avoid RFRA. Under the Court of Appeals' decision below, claims for judicial enforcement of environmental protection laws will be dismissed for lack of Article III redressability, simply on a representation by the non-federal actor that it can (but ultimately need not) get the money from non-federal sources.

Indeed, given the Court of Appeals ruling, Chicago is moving forward to spend the $1.282 billion in federally authorized PFC dollars and is threatening to use those federally authorized dollars to destroy St. Johannes Cemetery – while Petitioners are denied the benefit of congressionally mandated RFRA protection.

STATEMENT OF THE CASE

A. Facts.

St. John's United Church of Christ is a Christian Church established in Bensenville in 1849. St. Johannes Cemetery, the cemetery for St. John's and its congregation, dates back to the Church's founding. The consecrated ground of St.

Johannes contains the remains of about 1,300 departed adherents of this faith.

St. John's holds a central belief that on the Day of Resurrection the bodies of Christian believers will be resurrected to live with God. Church members believe that because God ordained St. Johannes as their loved ones' final resting place, the remains should not be disturbed until Judgment Day. They believe that the participation of the deceased members in the Day of Resurrection would be impaired if their remains were removed from the consecrated ground in which they were placed to await resurrection. Neither FAA nor Chicago questions the *bona fides* of these beliefs. App. 3a.

Among the Church's members who hold to these beliefs are petitioners Helen Runge and Shirley Steele. Mrs. Runge, now in her 80s, was baptized, married in, and intends to have her funeral at St. John's. About 25 of Mrs. Runge's relatives, including her husband and infant son, are buried at St. Johannes. Mrs. Runge visits St. Johannes to honor those buried there; she also owns a plot next to her husband, where she intends to be buried. She believes that disturbing the graves of her husband and son would be a sacrilege. Likewise, Mrs. Steele visits St. Johannes to care for and exercise her beliefs at the graves of her grandparents and others.

Chicago has proposed a $14.29 billion expansion plan for O'Hare International Airport involving, among other things, the construction of new runways and the modification and/or relocation of existing runways. JA-09047. This expansion plan

included acquisition and destruction of two religious cemeteries: the Rest Haven Cemetery; and St. Johannes Cemetery. Both St. John's and the owners of Rest Haven Cemetery sought to protect their religious cemeteries, maintaining rights to protection under RFRA from a substantial burden on religious exercise.

Chicago submitted its proposed expansion plan to the FAA for its approval, in the form of approval of an "Airport Layout Plan" ("ALP"), pursuant to 49 U.S.C. §47107(a)(16). In 2005, FAA approved the ALP. In that approval the FAA agreed that the destruction of Rest Haven Cemetery and St. Johannes Cemetery would impose a substantial burden on the exercise of religion within the meaning of RFRA.

The FAA further concluded, under the substantive strict scrutiny framework of RFRA, that there was not a sufficient compelling governmental need to justify the destruction of Rest Haven Cemetery, and directed Chicago to modify its plan to preserve Rest Haven. App. 21a.

But as to St. Johannes the FAA concluded, based on computer modeling studies that did not evaluate any non-destructive alternatives, that there was a compelling governmental need that required the destruction of St. Johannes.[2] FAA

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[2] FAA used computer modeling studies to compare the performance of various runway alignment alternatives that would destroy St. Johannes. However, FAA never conducted any such computer modeling to compare the aviation performance of Chicago's proposal with any of the alternatives that would preserve St. Johannes. JA-09172.

allowed Chicago to include the destruction of St. Johannes as an element of the FAA-approved ALP. App. 12a.

As observed by the Court of Appeals in proceedings below (App. 1a), this is the final of a series of attempts by Petitioners to obtain the identical RFRA protection of religious exercise at St. Johannes Cemetery that was afforded by FAA to Rest Haven Cemetery. In each case, including the immediate proceedings below, Petitioners were denied substantive review of the FAA actions burdening their religious exercise, because the Court of Appeals ruled that Petitioners had not cleared one or more of a series of jurisdictional or procedural hurdles.[3] While these were separate actions, the Court of Appeals in its opinion immediately below tacitly incorporated factual findings in the prior cases, making them essential to the review sought in this case. For clarity's sake this series of jurisdictional and procedural rejections of Petitioners' RFRA claim are described in the following summary of Proceedings Below, and are included in the Appendix to this Petition.

The immediate jurisdictional rejection of Petitioners' RFRA claim that is the subject of this Petition for a Writ of Certiorari is the Court of Appeals' December 19, 2008, determination

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[3] The only occasion on which there has been a substantive review of their Petitioners' RFRA claim was in the dissenting opinion in *Village of Bensenville, et al. v. FAA*, 457 F.3d 52 (2006). App. 51a-61a. The dissenting judge concluded that the majority should have reached the merits, and that FAA had not met the strict scrutiny requirements of RFRA.

(rehearing denied February 19, 2009) that Petitioners lacked standing, for lack of redressability, to challenge FAA's authorization of $1.282 billion for the project. App. 1a.

B. Proceedings Below.

1. The prior permitting and grant cases.

Village of Bensenville v. FAA, 457 F.3d 52 (D.C. Cir. 2006). App. 15a. This case involved two consolidated challenges to FAA actions based on violations of RFRA. Petitioners challenged FAA's approval of the ALP (effectively a permit), which included destruction of St. Johannes. Petitioners asserted that FAA was required to comply with RFRA in making its ALP approval decision.

Petitioners also challenged FAA's 2005 issuance of a "Letter of Intent" ("LOI") to grant $337 million in initial federal funding (in 15 annual installments) for Chicago's airport development project. App. 40a.

In a 2-1 decision, the Court of Appeals declined to reach the substance of either of Petitioners' claims that FAA had not properly applied RFRA strict scrutiny. Regarding the ALP approval, the majority held that approval of the plan was not sufficient federal action to attribute the cemetery destruction to FAA. App. 40a. The Court of Appeals held that the approval by the FAA of the ALP did not constitute the required degree of federal "coercion" or "encouragement" to attribute the destructive actions of Chicago to the FAA; and that therefore the FAA's ALP approval decision had not contributed to the destruction of St. Johannes.

Regarding the LOI, the Court of Appeals ruled that this was not a reviewable "final agency action," because the actual immediate disbursement of funds was subject to a further annual grant application process, and also was subject to congressional appropriations that would occur in subsequent fiscal periods. App. 42a. The Court further stated in dictum that even if there were a final order, there would be no Article III standing because Chicago had stated that it could obtain the $337 million elsewhere. App. 43a-44a.

The dissenting panel member concluded that the ALP approval of St. Johannes destruction was federal action subject to RFRA and that FAA had failed to correctly apply RFRA strict scrutiny. App. 60a.

St. John's United Church of Christ v. FAA, 520 F.3d 460 (D.C. Cir. 2008). App. 62a. The first annual grant in the $337 million LOI – a grant for $29.3 million – was awarded in 2006. Petitioners filed a petition for review of this final agency action.

While this petition was pending, FAA authorized $1.282 billion in PFC funding for the very same project that was the subject of the $337 million LOI funding. Petitioners then sought review of the PFC funding approval, and moved for consolidation of the petitions.

The legal and factual bases for the two petitions were largely common. Both the $337 LOI and the $1.282 PFC approval were for funding of the project that would destroy St. Johannes Cemetery. In both cases, Petitioners maintained that FAA had not properly applied RFRA strict scrutiny.

Notwithstanding the common issues (and contrary to the prior consolidation in *Village of Bensenville v. FAA*), the Court of Appeals denied consolidation and treated the $29.3 million LOI grant segment as a stand-alone matter.

The piecemeal payment of the $337 million LOI funds over 15 years of annual grants, and the Court of Appeals' choice of piecemeal review, thus created for Petitioners a dilemma in ever obtaining meaningful vindication of their RFRA rights. Under the FAA-Chicago grant funding arrangement, the grants were to be processed as reimbursement for segments of the airport development after they were completed by Chicago. Thus, in theory, the segment of the FAA grant funding nominally designated for the destruction of St. Johannes would only occur after the cemetery was irreversibly desecrated and destroyed.

The Court of Appeals again avoided reaching the merits of Petitioners' RFRA claim, under several rationales. First, the Court emphasized that the $29.3 million grant segment was reimbursement for work on a portion of the project that was located some distance from St. Johannes. App. 65a. The Court allowed this segmentation even though the $337 LOI expressly covers work that will destroy St. Johannes. The Court held that neither the balance of the $337 LOI nor the $1.282 billion in PFCs were before the Court. App. 65a-66a.

Ultimately, the Court of Appeals held that there was no Article III redressability because there was no showing by Petitioners that if the Court overturned the $29.3 million grant, Chicago would

not destroy St. Johannes. The Court noted that the $29.3 million was a small portion of the $337 million LOI and Chicago could replace the $29.3 million with other sources of funding. App. 67a.

2. The proceedings immediately below.

In 2007 FAA authorized $1.282 billion in PFC funding for the airport expansion project, which includes destruction of St. Johannes Cemetery. App. 1a. Petitioners sought review, maintaining that FAA's action in authorizing the $1.282 billion for a project that would destroy St. Johannes did not meet the RFRA strict scrutiny test.[4]

At this point several jurisdictional and procedural barriers to review imposed in the prior actions no longer existed. There was clearly a final federal "order" upon which the jurisdictional grant of 49 U.S.C. §46110 rested. The prior segmentation rationale – *i.e.,* that the money was for other segments of the project and not for the destruction of St. Johannes – was no longer valid because the PFC authorization clearly included the runway that would destroy St. Johannes.

Moreover, there existed substantial uncontroverted evidence that Chicago would abide by any order entered by FAA relating to RFRA protection of St. Johannes. Chicago had already complied with FAA's directive to preserve Rest Haven Cemetery, consistent with FAA's RFRA strict scrutiny analysis. This evidence made it

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[4] As noted above, the Court of Appeals had refused to consolidate the $1.282 billion PFC authorization with the then pending petition to review the $29.3 million FAA grant.

likely that Chicago would honor an FAA directive to preserve St. Johannes, if on remand FAA conditioned approval of the $1.282 billion PFC application on RFRA protection for St. Johannes.

The Court of Appeals nevertheless declined to address the merits of the Petitioners' RFRA claim, based on a purported failure to satisfy the redressability element of standing. App. 4a. Petitioners sought rehearing and rehearing *en banc* in the Circuit Court, which was denied on February 19, 2009. App. 13a-14a.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS DECISION CONFLICTS WITH DECISIONS OF THIS COURT.

According to the Court of Appeals, a petitioner cannot establish Article III standing when seeking to invalidate a federal agency's decision to provide funding under a federal statute as long the recipient of the federally approved funds asserts that it can obtain the money elsewhere and inflict the harm with non-federal money. The Court of Appeals made this ruling in the face of evidence in this case that Chicago would likely follow the directive of FAA or the Court of Appeals on remand if the Court of Appeals ruled in Petitioners' favor.

The decision of the Court of Appeals on the redressability component of standing directly conflicts with decisions of this Court on an important federal question.

The redressability standing precedents of this Court make it clear that where it is likely that the non-party actor will modify its behavior to reflect

and follow the decision of the federal actor, there is redressability under Article III. Here it is highly likely that Chicago would follow the direction of the FAA that is consistent with any relief ordered by a court pertaining to RFRA issues.

Indeed, it is clear from Chicago's prior conduct in dealing with the FAA's decision on the Rest Haven Cemetery that Chicago will follow FAA's decisions and directives as to RFRA. Chicago's original proposal called for the destruction of two religious cemeteries: St. Johannes and Rest Haven. Applying RFRA, FAA decided that Rest Haven Cemetery should be spared. Chicago complied with FAA's direction sparing Rest Haven; and it is highly likely that that Chicago would comply with a similar directive from FAA as to St. Johannes. This is especially true given that, as consistency would require, FAA could condition the approval of the present $1.282 billion in PFCs on RFRA compliance (as well as the additional billions in PFCs and AIP funds needed to complete Chicago's expansion plan).

The issue of redressability for St. Johannes clearly falls within the reasoning of this Court's decisions in *Franklin v. Massachusetts,* 505 U.S. 788, 803 (1992), and *Utah v. Evans,* 536 U.S. 452, 463-64 (2002). In *Franklin v. Massachusetts* the Court found redressability on the assumption that the non-party (the President) would abide by the decision of the Court and the Secretary of Commerce. In *Utah v. Evans* the Court again assumed that the non-parties would abide by a decision by the Court and the Secretary of Commerce. In both of these cases the Court recognized that it was conceivable that the non-

party might not abide by the decision of the Court or the agency. But the Court found redressability standing in both cases based on a presumption that the non-party would be likely abide by an authoritative decision.

The Court of Appeals itself had previously followed the precedent of *Utah v. Evans* on this point of standing and redressability, in *National Parks v. Manson,* 414 F.3d 1, 6-7 (D.C. Cir 2005). There the Court of Appeals found redressability because the federal agency's decision would likely "influence" the actions of the non-federal actor.

The precedent set by this Court in *Franklin v. Massachusetts* and *Utah v. Evans* defines a rule that is understandable and readily applicable. It is reasonable to presume that the non-party will abide by and accommodate itself to an authoritative decision on important federal law, such as RFRA. Indeed, the likelihood of Chicago complying with an FAA RFRA directive in this case is even more likely here because FAA held the keys to billions of dollars in federally authorized funds Chicago needs to complete its proposed expansion.

Rather than applying this reasonable presumption founded in this Court's precedent, in analyzing whether there was sufficient likelihood of redressability for standing the Court of Appeals concocted a fictional all-or-nothing choice that had no foundation whatsoever in the case – a fictional choice between sparing the cemetery and canceling the entire O'Hare expansion project. The Court of Appeals stated:

> Finally, if we were to vacate the PFC authorization, Chicago could go back to the

> airlines and attempt to renegotiate. As we have already said during one of this case's many predecessors in our court, the necessity of renegotiations with the airlines would "not create 'a significant increase in the likelihood' that the project would be scuttled altogether rather than merely delayed."

App. 4a (emphasis added).

The Court of Appeals rationale fails on several grounds. First, courts have been skeptical of attempts to raise a lack of redressability by assertion that government and officials would evade an adverse decision. As stated in a leading treatise, as a general rule the courts do not receive such arguments warmly:

> Defendants at times seek to exploit the remedial-benefit requirement by arguing that any available remedy can be evaded. Courts do not receive such arguments warmly. Public officials have not been able to defeat standing either by blustering assertion or by more discrete representations that other ways can be found to maintain the challenged result.

Wright & Miller, 13 Fed. Prac. & Proc. Juris. 2d §3531.6 (text preceding fn. 99). *See e.g., Davis v. HUD*, 627 F.2d 942, 944-45 (9th Cir. 1980); *Akins v. FEC*, 101 F.3d 731, 738-39 (D.C. Cir. 1996), vacated on other grounds, 524 U.S. 11 (1998); *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172, 1178 (9th Cir. 2000); *Sierra Club v. Franklin County Power of Illinois*, 546 F.3d 918, 927 (7th Cir. 2008).

Second, there is all the more reason for disregarding an expressed intention of acting in

spite of an adverse determination where the speculative evasion offered is not supported by sound reasoning or the record. *International Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 811-12 (D.C. Cir. 1983). Such is the case here. The Court of Appeals positing of a choice between injury to religion, versus the project being "scuttled altogether," was an unrealistic scenario, with no foundation in the case.

Third, the uncontested record in this case itself demonstrates that the "all-or-nothing" choice which the Court of Appeals posited for its redressability analysis was totally implausible. Chicago's original proposal called for the destruction of two religious cemeteries: St. Johannes Cemetery and Rest Haven Cemetery. FAA decided under RFRA that the Rest Haven Cemetery should be spared in its ALP decision. App. 20a-21a. Chicago complied with FAA's RFRA direction sparing Rest Haven.

Ignoring this obvious precedent for accommodation of religious exercise in the O'Hare expansion project itself, the Court of Appeals performed its redressability analysis under a presumption – pulled from thin air – that accommodating Petitioners' religious exercise interests would result in the entire airport development to be "scuttled." In the context of redressability, it is reasonable to assume that Chicago would accept some level of adjustment of its plan, rather than lose more than a billion dollars in funding in this $1.282 billion PFC authorization, let alone the potential for loss of additional billions in future federally authorized aid for the project.

Surely an assessment of predicted redressability, invoked here so as to deny Petitioners their day in court on the merits, should have some grounding in the practical real world choice that Chicago would face, not in a unsupported conjecture. The practical reality is that Chicago would likely adhere to FAA's (and the court's) RFRA directive rather than forego billions in federally authorized funding assistance.[5]

The Court of Appeals' treatment of the standing redressability issue is unguided by any principle, and has drifted in a direction that does not square with this Court's precedent. The matter at issue is an important RFRA religious protection right mandated by Congress. RFRA should not be trivialized by subordinating it to an implausible imaginary scenario, so as to defeat substantive RFRA rights on an erroneous view of standing, prior to review on the merits.

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[5] Contrary to the Court of Appeals' unquestioning acceptance of Chicago's assurances that Chicago could replace the billions in federally authorized money elsewhere from non-federal sources, Chicago has never issued bonds for airport development where the O'Hare airlines have not agreed in advance to the bond issue. Here the airlines have refused to back new bond indebtedness that would replace billions in federally authorized financing resources (grants and PFCs). In addition, these same airlines also have refused to participate in any further airline backed bonds to fund the billions in non-federal funds projected by Chicago as needed to complete the expansion project. JA-09048; JA-09119; Addendum to Petition for Rehearing, at A-15 to A-23.

II. THE COURT OF APPEALS' DECISION EVISCERATES THE RFRA PROTECTION MANDATED BY CONGRESS.

Congress enacted the Religious Freedom Restoration Act "to protect one of 'the most treasured birthrights of every American' – 'the right to observe one's faith, free from Government interference.'" *Jackson v. District of Columbia*, 254 F.3d 262, 265 (D.C. Cir. 2001) (quoting S. Rep. No. 103-111, at 4 (1993)). To promote this fundamental objective, RFRA prohibits the government from taking any action that would "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. §2000bb-1(a). Only one limited exception to this otherwise absolute injunction exists. The government must prove that the proposed action is "in furtherance of a compelling governmental interest" and is "the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §2000bb-1(b).

Under the plain terms of the statute, while the person seeking RFRA protection of religious exercise must show the substantial burden, the government has the burden of demonstrating to a reviewing court that the contemplated action falls within the statute's stated exception; *i.e.,* that it is in furtherance of a compelling governmental interest; and the action is the least restrictive means of furthering that compelling governmental interest. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 126 S.Ct. 1211, 1219 (2006).

Here there is no dispute that the contemplated destruction of St. Johannes will substantially burden religious exercise. FAA has always conceded that element of the RFRA claim. App. 3a. RFRA expressly provides for judicial relief in a case of its violation. 42 U.S.C. §2000bb-1(c).

Yet in two related rulings the Court of Appeals has constructed procedural hurdles that effectively eviscerate RFRA protection in all cases where the federal government either exercises permit approval authority or provides federal funding assistance for actions by non-federal parties that injure religion.

The Court of Appeals ruled in *Village of Bensenville v. FAA* that the exercise of federal permitting authority for a project that harms religion does not trigger federal agency RFRA obligations, based on a rationale that a federal permit does not "encourage" or "coerce" the conduct harmful to religion.

Now the Court of Appeals in the decision below has dropped the other shoe and has ruled that no amount of federal funding (even billions of dollars) of the religiously harmful activity can meet the Article III standing requirement, as long as the non-federal party invokes a fiction that it can raise the money anyway from non-federal sources. Taken together, these two decisions virtually eliminate substantive RFRA review of federal involvement, so long as the physical activity that harms religious practice is conducted by non-federal parties.

In stark contrast to this elimination of religious law protection under RFRA are the cases where

environmental laws are enforced when the federal government exercises permitting or funding authority over the actions of non-federal parties that may harm the environment.

Congress surely did not intend that RFRA religious free exercise rights be less important than environmental protection or be trivialized by creation of an insurmountable standing redressability hurdle that is constructed on implausible fictional footings. Indeed, in making this redressability ruling, the Court of Appeals effectively excused itself from its constitutional obligation to make a substantive decision on the merits on a matter expressly committed to it by Congress.

This abdication of judicial duty potentially violates the Constitution, because the Court of Appeals has declined to address a matter which has been expressly assigned to it by Congress. Congress has mandated substantive RFRA protection for federal actions that cause substantial harm to the exercise of religion. Nowhere has the Constitution or the Congress authorized the Judiciary to ignore Congress's mandate. Indeed, the Constitution compels the Judiciary to take jurisdiction over the case. *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 404 (1821); *Marshall v. Marshall*, 547 U.S. 293, 298 (2006).

III. THE COURT OF APPEALS' DECISION CREATES PRECEDENT FOR EVISCERATION OF ENVIRONMENTAL PROTECTION LAWS ACROSS THE BOARD.

Central to the Court of Appeals ruling that Petitioners lacked standing "redressability" was the

Court's adoption of Chicago's claim that it could obtain a non-federal substitute for the $1.282 billion in PFC funds elsewhere, if the Court enforced RFRA. Putting aside the serious question of whether Chicago could actually obtain the massive shortfall in federally approved funds, the Court of Appeals' jurisdictional ruling is a dangerous precedent for evisceration of enforcement of many important environmental laws in comparable circumstances.

The Court of Appeals ruling has left Petitioners and this Court with a choice between equally unacceptable alternatives. On one hand, the Court can allow a lesser and weaker level of judicial protection for RFRA religious rights while allowing continued recognition of Article III jurisdiction to challenge violation of federal environmental laws by non-federal actors funded with federal money. But such a position would require this Court to conclude that Congress meant to elevate environmental protection above protection of religious rights.

On the other hand, allowing the logical extension of Court of Appeals' precedent here – to judicial challenges to violations of federal environmental laws in federal funding of non-federal actors – would be equally unacceptable. If not reviewed by this Court, the Court of Appeals' unprecedented jurisdictional ruling will have sweeping effects over many other important federal statutes under which federal agencies routinely make funding decisions and are routinely challenged in court over those funding decisions for violations of federal environmental laws.

In particular, a holding that there is no Article III jurisdiction for seeking enforcement of federal statutory requirements involving federal funding – for lack of redressability – will dramatically weaken environmental protection in cases involving federal funding assistance of third party projects such as highways, sewage treatment plant and other state and local projects. Local governments wishing to build federally funded projects that will destroy precious parks, wetlands and historic sites can simply avoid judicial enforcement of federal environmental laws (*e.g.*, section 4(f) of the Department of Transportation Act of 1966; 49 U.S.C. §303(c)) by making the Article III argument that it can obtain alternative funds.

The potential created by the Court of Appeals decision for widespread disregard of federal laws in projects involving federal funding of actions by non-federal parties justifies and requires clarification by this Court.

CONCLUSION

Petitioners, whose sacred religious cemetery will be desecrated and destroyed by the proposed expansion of O'Hare Airport, respectfully request that this Court grant review on whether they have Article III standing to enforce compliance with the protections afforded by the Religious Freedom Protection Act.

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